No. 96-300

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CHERYL ADAMS, RICHARD WAUGH, BRENT ADAMS, RONALD RING, PATRICIA ADAMS, ROBERT RAVITZ, CARRIE BURKE, WELDON ADAMS, ELIZABETH TARGEE, TINA LEVESQUE and MELISSA SMITH RAPA,

Petitioners,

vs.

CUMBERLAND FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Cout of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BARBARA D. GILMORE
Counsel of Record
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2853

Of Counsel:

MICHAEL C. KELLY
CUMBERLAND FARMS, INC.
777 Dedham Street
Canton, Massachusetts 02021-9118
(617) 828-4900

9637
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

31 pp

CORPORATE DISCLOSURE

Respondent Cumberland Farms, Inc. has no parent company nor any wholly or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Corporate Disclosure	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. Procedural History	1
B. Statement of Facts	2
Reasons for Denying the Writ	5
I. Petitioners' Claim Are Moot.	5
II. It Is Well Settled Law That A Claimant Waives The Right To A Jury Trial By Filing A Proof Of Claim In A Bankruptcy Proceeding.	6
III. The Bankruptcy Court Had Jurisdiction Over The Petitioners' Claims Because Those Claims Are Not Personal Injury Claims As That Term Has Been Interpreted By United States Bankruptcy And District Courts.	7
IV. The Petitioners' Argument That The Outcome Of The Proceedings Involving Their Claims Against Nondebtors Had No Effect On The Debtor's Estate Was Not Raised Below And Is Factually Inaccurate.	9

Contents

Page

V. Whether The Bankruptcy Court Abused Its Discretion In Fashioning The Estimation Proceeding Used To Fix The Petitioners' Claims Does Not Justify Review By This Court. 10

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Bertholet v. Harmon, 126 B.R. 413 (Bankr. D.N.H. 1991) 8

Boyer v. Belanoff (In re Boyer), 93 B.R. 313 (Bankr. N.D.N.Y. 1988) 8

Curley v. Cumberland Farms, Inc., 27 F.3d 556 (3d Cir. 1994) 2

Fishmarket Nominee v. Pelofsky, 72 F.3d 4 (1st Cir. 1995) 7

Graver Tank and Mfg. Co. v. Linde Products Co., 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part and reversed in part*, 339 U.S. 605 (1950) 10

In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7 (1st Cir. 1993) 7, 9

Contents

	Page
Lang v. Lang (In re Lang), 166 B.R. 964 (D. Utah 1994)	8
Langencamp v. Culp, 490 U.S. 42 (1990)	6
Matter of Interco, Inc., 135 B.R. 359 (Bankr. E.D. Mo. 1991)	8
Matter of Poole Funeral Chapel, Inc., 63 B.R. 527 (Bankr. N.D. Ala. 1986)	7
Perino v. Cohen (In re Cohen), 107 B.R. 453 (S.D.N.Y. 1989)	7, 8
Powell v. McCormick, 395 U.S. 486 (1969)	6
Vince v. Town of Carmel (In re Vince), 108 B.R. 439 (Bankr. S.D.N.Y. 1989)	8
Statutes Cited:	
28 U.S.C. § 157(b)(2)(B)	6, 7
42 U.S.C. § 1962(c)	2
42 U.S.C. § 1962(d)	2
Other Authority Cited:	
Statement by the Honorable Robert W. Kastenmeier, 1984 U.S. Code Cong. & Admin. News 580	7

Contents

Page

APPENDIX

Appendix A — Memorandum Opinion of the United States District Court for the District of Massachusetts Dated August 28, 1995 ..... 1a

Appendix B — Order of Dismissal of the Superior Court for Suffolk County Dated July 5, 1995 ..... 9a

Appendix C — Order of the Massachusetts Appeals Court Entered August 16, 1996 ..... 14a

Appendix D — Judgment of the Massachusetts Supreme Judicial Court Entered September 11, 1996 ..... 15a

Respondent requests that the Court deny the petition for certiorari seeking review of a judgment of the United States Court of Appeals for the First Circuit primarily because, as set forth below, even if the Court were to grant certiorari and on the merits rule in favor of Petitioners, Petitioners' claims are moot.

STATEMENT OF THE CASE

A. Procedural History

Petitioners seek a review of the May 6, 1996 decision of the United States Court of Appeals for the First Circuit (Petition at Appendix A) affirming the June 7, 1995 order of the United States District Court for the District of Massachusetts (Petition at Appendix B) which, acting as an appellate court, affirmed the August 30, 1993 order of the United States Bankruptcy Court for the District of Massachusetts (Petition at Appendix C). In its August 30 order, the bankruptcy court approved a non-opt out settlement class consisting of 273 former employees of Respondent ("*Loss Prevention Claimants*"), including Petitioners, and approved a mechanism whereby a class-wide settlement of their claims would be submitted to the United States District Court for the District of New Jersey where fourteen (14) of Respondent's former employees had a lawsuit pending in a case styled *Lance Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057 (SSB).

In 1993 CFI reached an agreement in *Curley* to settle the so-called loss prevention claims on a class-wide basis. As part of the proposed *Curley* settlement, the parties to that action filed a joint motion in the bankruptcy court requesting the creation of a mandatory class that would consist of all Loss Prevention Claimants. The bankruptcy court, over Petitioners' objections, granted the joint motion. (Petition at 12A-13A). Petitioners appealed and the district court affirmed. (Petition at

11A). The court of appeals affirmed the district court's decision. (Petition at 1A-10A).

The Court in *Curley* ultimately approved the class settlement which provided for an opt-out class for those individuals who had not filed proofs of claim in Respondent's bankruptcy and a mandatory class consisting of those who had filed such proofs of claim. (Petition at 14A-16A). Petitioners' appealed that order; the United States Court of Appeals for the Third Circuit affirmed. *See Curley v. Cumberland Farms, Inc.*, 27 F.3d 556 (3d Cir. 1994).

B. Statement of Facts

The opinion of the court of appeals correctly sets forth the facts in this case. Petitioners' statement of facts (much of which is not relevant to a determination of whether certiorari should be granted) omits several material facts. Before the filing of Respondent Cumberland Farms, Inc.'s ("*CFI*") bankruptcy petition, Petitioner Cheryl Adams, individually, and after the filing of CFI's bankruptcy petition, in connection with numerous others — including the ten other Petitioners, filed various actions against CFI and/or its officers, directors, shareholders, employees and agents as well as a number of public officials both in Federal and Massachusetts state courts. The gravamen of Petitioners' claims was that CFI and various individuals employed by CFI extorted money from low level CFI employees by extracting false confessions of theft on threats of criminal prosecution, public exposure and the like. The claims asserted included false imprisonment, wrongful termination, malicious prosecution, abuse of process, defamation, intentional infliction of emotional distress, violation of Massachusetts civil rights laws and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 42 U.S.C. § 1962(c) and (d). A summary of the cases

relevant to an understanding why certiorari should not be granted are set forth below.

(1) *Adams I*: The first of the lawsuits, *Adams v. Cumberland Farms, Inc., et al.* was commenced by Petitioner Cheryl Adams in Essex County Superior Court, No. 91-231, but because she asserted a claim under RICO, the defendants removed the case to the United States District Court for the District of Massachusetts, No. 91-10627-S. After the District Court dismissed Adams' RICO count, the case was remanded to state court where is was subsequently consolidated with *Waugh*, discussed below. (Appendix A at 3a).

(2) *Ring*: Following Cheryl Adams' unsuccessful attempts to amend the complaint and to obtain class certification in *Adams I*, Petitioners commenced a second action, *Ring, et al. v. Cumberland Farms, Inc., et al.* in the United States District Court for the District of Massachusetts, Civil Action No. 93-10051-H. That complaint, asserted the same claims as set forth in *Adams I*, including a virtually identical RICO claim. *Ring* was dismissed and no appeal was taken from the order of dismissal. (Appendix A at 3a-4a).

(3) *Waugh*: Subsequently, a third action, *Waugh, et al. v. Haseotes, et al.*, was filed in state court but removed to the United States District Court for the District of Massachusetts where it was assigned to Judge Harrington, the judge who had dismissed *Ring*. Before Judge Harrington could rule on the defendants' motion to dismiss, the *Waugh* plaintiffs voluntarily dismissed their federal claims. The case was remanded to state court where it was consolidated with *Adams I*. The consolidated action has been dismissed by the superior court (Appendix B at 9a). The Massachusetts Appeals Court affirmed the dismissal. (Appendix C at 14a). The Massachusetts Supreme Judicial Court denied the *Waugh* plaintiffs' petition for extraordinary relief. (Appendix D at 15a).

(4) *Spain*: After the dismissal of *Ring* and while *Adams I* and *Waugh* were pending in state court, Petitioners, along with others, commenced yet another action, *Spain, et al. v. Haseotes, et al.* in the United District Court for the District of Massachusetts, Civil Action No. 93-11725-NF. This action was virtually identical to its predecessors and was dismissed, along with two other actions filed by Petitioners' attorney, in its entirety. (Appendix A at 4a).

Also relevant is the conduct of Stanley R. Cohen, Petitioners' attorney of record in all these actions. As articulated by Judge Tauro

> *Spain* was the fourth in the series brought by Attorney Cohen. As noted above, all four complaints presented essentially the same claims on behalf of shifting groups of Cohen's Plaintiffs. By the time *Spain* was filed, the RICO and ERISA claims of twelve of the Plaintiffs had already been adjudicated and dismissed in two cases, *Adams I* and *Ring*. *See Spain*, Memorandum and Order April 25, 1995. In an effort to distinguish the claims from those already dismissed, Attorney Cohen added allegations against the Defendants' attorneys. This court and others have found that he had no evidence to support these claims. *Spain*, April 25, 1995; *Adams v. Mass. Sup. Ct.*, Docket No. 94-0627, June 8, 1995. The claims of the other Plaintiffs were either barred by applicable statutes of limitation or were otherwise defective for the same reasons as those in *Adams I* and *Ring*. [Appendix A at 5a-6a].

Moreover, Judge Tauro went on to conclude that the conduct of Stanley R. Cohen

> in these matters have [sic] resulted in his being sanctioned and/or held in contempt five times by two courts.[1] The District of New Jersey held Cohen in civil contempt on two occasions, May 4, 1994 (specifically enjoining Cohen and his plaintiffs from prosecuting *Waugh*, *Spain*, and the three other *Adams*) cases and on July 19, 1995, for directly violating its orders. The Superior Court for Suffolk County, Commonwealth of Massachusetts has sanctioned Cohen[2] three times, August 10, 1994, August 29, 1994 and July 12, 1995. [Appendix A at 5a].

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' CLAIM ARE MOOT.

Although Petitioners' conduct, and that of their attorney, suggests that they will continue to commence lawsuits regarding their loss prevention claims, all such claims are moot. Their federal claims were dismissed in *Ring*, as well as in other

---

1. In reality Attorney Cohen had been sanctioned by three courts. Judge Tauro's decision failed to include the bankruptcy court's order of April 21, 1994 holding Attorney Cohen in contempt.

2. In addition the Superior Court for Suffolk County also sanctioned Cheryl Adams individually.

cases such as *Adams I* and *Spain*; their state law claims have been dismissed in *Adams I* and *Waugh*, as well as in other state cases such as *Adams, et al. v. Burke, et al.*, Suffolk County Superior Court, Docket No. 94-0622-B. (Appendix A at 4a-5a). Petitioners' claims are moot and thus certiorari should not be granted. *See Powell v. McCormick*, 395 U.S. 486, 496 n. 7 (1969).

II.

IT IS WELL SETTLED LAW THAT A CLAIMANT WAIVES THE RIGHT TO A JURY TRIAL BY FILING A PROOF OF CLAIM IN A BANKRUPTCY PROCEEDING.

The court of appeals correctly found that Petitioners had either waived their right to a jury trial or such a claim was "substantially without merit," or both. (Petition at 9A). Petitioners' filing of a proof of claim in CFI's bankruptcy waives their right to a jury trial. *Langencamp v. Culp*, 490 U.S. 42, 44-45 (1990) (filing proof of claim invokes bankruptcy court's equitable jurisdiction and generally waives the right to jury trial). Although the bankruptcy court would not have jurisdiction to liquidate a personal injury or wrongful death claim, *see* 28 U.S.C. § 157(b)(2)(B), Petitioners' claims, as set forth below, do not fall within that exclusion.

III.

THE BANKRUPTCY COURT HAD JURISDICTION OVER THE PETITIONERS' CLAIMS BECAUSE THOSE CLAIMS ARE NOT PERSONAL INJURY CLAIMS AS THAT TERM HAS BEEN INTERPRETED BY UNITED STATES BANKRUPTCY AND DISTRICT COURTS.

The court of appeals correctly declined to address the issue of whether Petitioners' claims constituted personal injury claims because that argument was raised for the first time on appeal. *Fishmarket Nominee v. Pelofsky*, 72 F.3d 4, 6 (1st Cir. 1995); *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 9 (1st Cir. 1993). Moreover, there is nothing to suggest that the term "personal injury" as that term is used in 28 U.S.C. § 157(b)(2)(B) has been improperly interpreted.

Although the legislative history of Section 157(b)(2)(B) is somewhat sparse, Congress apparently intended to exclude only a "narrow range" of claims as personal injury or wrongful death claims. *See* Statement by the Honorable Robert W. Kastenmeier, 1984 U.S. Code Cong. & Admin. News 580.

In one of the earliest cases dealing with the interpretation of the words "personal injury tort," the court in *Matter of Poole Funeral Chapel, Inc.*, 63 B.R. 527, 530 (Bankr. N.D. Ala. 1986), concluded that Congress "must have intended that these words be interpreted broadly." The court determined that claims "sounding in tort" ultimately needed to be tried outside the bankruptcy forum. The growing body of law rejects *Poole* and supports a definition of personal injury as used in Section 157 that excludes torts without trauma or bodily injury.

In *Perino v. Cohen (In re Cohen)*, 107 B.R. 453, 455

(S.D.N.Y. 1989), the court, recognizing that the words "personal injury" must have some meaning, held that a plaintiff's claim for discrimination, although a tort, did not constitute a *personal injury* tort within the meaning of Section 157. The court determined that a state law claim for discrimination was "not a claim for 'a personal injury tort' in the traditional, plain meaning sense of those words, such as slip and fall or the psychiatric impairment beyond mere shame and humiliation." *Id.* at 455. *See also Matter of Interco, Inc.*, 135 B.R. 359, 362 (Bankr. E.D.Mo. 1991); *Bertholet v. Harmon*, 126 B.R. 413, 415-16 (Bankr. D.N.H. 1991); *Vince v. Town of Carmel (In re Vince)*, 108 B.R. 439, 442 (Bankr. S.D.N.Y. 1989). *Contra Boyer v. Belanoff (In re Boyer)*, 93 B.R. 313 (Bankr. N.D.N.Y. 1988).

In the more recent case of *Lang v. Lang (In re Lang)*, 166 B.R. 964 (D. Utah 1994), the court, without deciding whether a claim for intentional infliction of emotional distress was a "personal injury tort," adopted the approach of the *Bertholet* court which requires that a claim involve "requisite trauma or bodily injury." *Bertholet*, 126 B.R. at 415-16. Because the husband's claim in *Lang* was really one for fraud (namely, the debtor's wife's misrepresentation as to his paternity of her children), his "emotional distress claim [was] too tangential to his lawsuit to support withdrawal of the entire matter solely on the basis of the emotional distress claim. Further [the husband's] claim of emotional distress is intimately connected to his claim of fraud, making it impractical and inefficient to withdraw the emotional distress claim by itself. " *Lang*, 166 B.R. at 967.

Similarly Petitioners' claims center around CFI's alleged fraud and extortion in obtaining confessions and restitution. Petitioners' essential claim, like that in *Lang*, is fraud. Claims for emotional distress are too attenuated to pass the *Bertholet* test.

There are no reported decisions from courts of appeal or bankruptcy appellate panels interpreting the phrase "personal injury." Consequently, in light of Petitioner's late argument that its claims were personal injury torts and given the lack of a conflicting decision at the court of appeals level, the petition should be denied.

IV.

THE PETITIONERS' ARGUMENT THAT THE OUTCOME OF THE PROCEEDINGS INVOLVING THEIR CLAIMS AGAINST NONDEBTORS HAD NO EFFECT ON THE DEBTOR'S ESTATE WAS NOT RAISED BELOW AND IS FACTUALLY INACCURATE.

Petitioners failed to argue below that the bankruptcy court lacked the authority to approve a mandatory class that would release claims against nondebtor parties. Petitioners have waived this argument. *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d at 9. Moreover Petitioners are only entitled to one recovery; that recovery is the one contemplated under the class settlement.

Petitioners' assertion that claims against nondebtors have no effect on CFI is factually inaccurate. Petitioners overlook the nondebtor defendants' statutory, common law and contractual rights of indemnification against CFI. Because the indemnification contracts between CFI and each of its officers and directors were assumed as part of CFI's bankruptcy, any judgments collected against such officers and directors would be indemnified by CFI. This would be a direct, financial effect on CFI.

V.

WHETHER THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN FASHIONING THE ESTIMATION PROCEEDING USED TO FIX THE PETITIONERS' CLAIMS DOES NOT JUSTIFY REVIEW BY THIS COURT.

As a court of law this Court ordinarily does not undertake to correct errors of fact or abuse of discretion. *Cf. Graver Tank and Mfg. Co. v. Linde Products Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part and reversed in part*, 339 U.S. 605 (1950).

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

BARBARA D. GILMORE
Counsel of Record
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2853

Of Counsel:

MICHAEL C. KELLY
CUMBERLAND FARMS, INC.
777 Dedham Street
Canton, Massachusetts 02021-9118
(617) 828-4900

APPENDIX A — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED AUGUST 28, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA No. 93-11725-JLT
CA No. 94-10229-JLT
CA No. 95-11170-JLT

LENORA SPAIN, et al.,

Plaintiffs,

v.

DEMETRIOS HASEOTES, et al.,

Defendants,

CHERYL ADAMS, et al.,

Plaintiffs,

v.

KEVIN BURKE, et al.,

Defendants,

LAETITIA SALVATORE, et al.,

Plaintiffs,

v.

CUMBERLAND FARMS, INC.

Defendants.

Appendix A

MEMORANDUM

August 28, 1995

TAURO, Ch. J.

The above cases were filed by attorney Stanley R. Cohen, Esq., on behalf of 26 plaintiffs (the "Cohen Plaintiffs"). The plaintiffs were each former employees of Cumberland Farms, Inc. ("CFI"). In essence, the plaintiffs assert that CFI engaged in an extortionate loss control policy. Pursuant to this alleged practice, CFI officials would levy false accusations of theft against its employees, coerce confessions and report employees to the police. Many former CFI employees assert that they were railroaded in this manner and ended up with undeserved felony convictions.

Presently before the court are Defendants' motion to dismiss and motions for attorney's fees and sanctions.

I.

Background

In an unrelated action, the United States District Court for the District of New Jersey heard a case presenting the same allegations as those made by Cohen's Plaintiffs. *Curley, et al. v. Cumberland Farms, Inc., et al.*, United States District Court for the District of New Jersey, CA No. 86-5057 ("*Curley*"). This case resulted in the certification of a class for settlement purposes, consisting of all persons employed by CFI from October 15, 1970 through June 22, 1993. *Curley*, Order, July 28, 1993. Notice of the proposed settlement, along with the

right to opt-out of the class, was served upon members of the class and published. *Curley,* Findings of Fact and Conclusions of Law, July 19, 1995 at 6. A Final Order and Judgment was entered in *Curley* on behalf of the class creating a large settlement fund. *Curley,* Final Order and Judgment, September 8, 1993.

In the mean time, CFI filed for bankruptcy. Although as noted, class members were originally given the opt-out option, an order of the Bankruptcy Court mandated that all individuals who filed LPD Bankruptcy Claims against CFI's estate participate in the class. *In re Cumberland Farms, Inc.,* United States Bankruptcy Court for the District of Massachusetts, No. 92-41035-JFQ. That Order was affirmed by this court, *Adams, et al., v. Cumberland Farms, Inc.,* United States District Court for the District of Massachusetts, June 7, 1995, CA No. 93-40187-NMG, and is presently on appeal to the First Circuit. *Adams, et al. v. Cumberland Farms, Inc.,* CA No. 95-1736. As mandatory members of the class, therefore, most, if not all of Cohen's Plaintiffs had their claims against CFI and its officials extinguished.

Instead of waiting for the outcome of these appeals, Attorney Cohen began to file numerous complaints in both federal and state court on behalf of shifting groups of plaintiffs and defendants. *See Ring, et al., v. Haseotes, et al.,* United States District Court for the District of Massachusetts CA No. 93-10051 — EJH; *Cheryl Adams v. Cumberland Farms, Inc., et al,* United States District Court for the District of Massachusetts CA No. 93-10627 — S, Essex County Superior Court, Commonwealth of Massachusetts, Docket No. 91-231 ("*Adams I*") (now consolidated with *Waugh*); *Waugh, et al. v. Haseotes, et al.,* Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 93-2663, United States District

Court for the District of Massachusetts, CA No. 93-11208-H ("*Waugh*"); *Spain, et al. v. Haseotes, et al.,* United States District Court for the District of Massachusetts, CA No. 93-11725-JLT ("*Spain*"); *Adams, et al. v. Burke,* United States District Court for the District of Massachusetts, CA No. 94-10229-JLT ("*Adams V*"); *Adams, et al. v. Burke, et al.*, Suffolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-0627-B ("*Adams VI*"); *Judson, et al. v. Cumberland Farms, Inc., et al.,* Norfolk Superior Court, Commonwealth of Massachusetts, Docket No. 94-02536 ("*Judson*"); *Laetitia Salvatore, et al. v. Cumberland Farms, Inc., et al.*, United States District Court for the District of Massachusetts Ca No. 95-11170-JLT ("*Salvatore*").

For the most part, each complaint listed the same claims — a mixture of RICO, ERISA and state counts. As noted below, some of the complaints joined public officials and attorneys as defendants. All of the above cases, except the last two, have been dismissed. *See, e.g., Spain,* Memorandum and Order, April 25, 1995.

As of this writing, Cohen's conduct in these matters have resulted in his being sanctioned and/or held in contempt five times, by two courts. The District of New Jersey held Cohen in civil contempt on two occasions, May 4, 1994 (specifically enjoining Cohen and his plaintiffs from prosecuting *Waugh, Spain* and the three *Adams* cases) and July 19, 1995, for directly violating its orders. The Superior Court for Suffolk County, Commonwealth of Massachusetts has sanctioned Cohen three times, August 10, 1994, August 29, 1994 and July 12, 1995. A full procedural history of the cases and analysis of Attorney Cohen's actions was set forth in detail by the District of New Jersey. *See Curley,* Findings of Fact and Conclusions of

Appendix A

Law, July 19, 1995. The court will not repeat the facts here, but will merely summarize them as they pertain to the three cases at issue.

II.

Analysis

With regard to the three cases before this court, two have already been dismissed in their entirety. *Spain*, Memorandum and Order, April 25, 1995; *Adams VI*, Memorandum and Order, April 26, 1995. Defendants have moved in those cases for an award of attorneys' fees and costs. *Salvatore* was filed on June 5, 1995, barely one month after the judgments of dismissal entered in *Spain* and *Adams VI*. Defendants have filed both a motion to dismiss and motions for attorneys' fees and costs.

1. *Spain, et al. v. Haseotes, et al.*, CA No. 93-11725-JLT and *Adams, et al. v. Burke, et al.*, CA No. 94-10229-JLT.

Defendants request an order requiring Plaintiffs' attorney to pay their costs and attorneys' fees, pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 (Counsel's liability for excessive costs).

Spain was the fourth in the series brought by Attorney Cohen. As noted above, all four complaints presented essentially the same claims on behalf of shifting groups of Cohen's Plaintiffs. By the time *Spain* was filed, the RICO and ERISA claims of twelve of the Plaintiffs had already been adjudicated and dismissed in two cases, *Adams I* and *Ring*. *See Spain*, Memorandum and Order, April 25, 1995. In effort to distinguish the claims from those already dismissed, Attorney

Cohen added allegations against the Defendants' attorneys. This court and others have found that he had no evidence to support these claims. *Spain,* April 25, 1995; *Adams V,* Mass. Sup. Ct. Docket No. 94-0627, June 8, 1995. The claims of the other Plaintiffs were either barred by applicable statutes of limitation or were otherwise defective for same reasons as those in *Adams I* and *Ring.*

Adams VI, on the other hand, was filed after the Final Judgment and Order in *Curley.* This Judgment and Order distinguished [sic] the claims of the class members. As noted above, Cohen's Plaintiffs were specifically ordered to participate in the class. The District Court of New Jersey held Attorney Cohen in contempt for filing *Adams VI* and enjoined any further prosecution of the case. This Order was affirmed by the Third Circuit. *Curley, et al. v. Cumberland Farms, Inc. et al.,* no. 94-5306 (Third Circuit January 25, 1995).

Three months after being held in contempt and enjoined from further prosecuting the case, Attorney Cohen filed an amended pleading in *Adams VI.* This complaint added as defendants the Clerk of the Superior Court for Suffolk County, and assistant clerk of the same court, a Massachusetts law firm and one of its partners. Again, Attorney Cohen had no evidence to support the allegations against these defendants. *See Adams VI,* CA No. 94-10229-JLT, April 26, 1995.

2. *Salvatore, et al. v. Cumberland Farms, Inc.,* CA No. 95-11170-JLT.

The District of New Jersey has enjoined Cohen and his 26 plaintiffs from prosecuting *Salvatore, Spain, Waugh,* the three *Adams* cases and *Judson. Curley,* Order Entering Injunctive

Appendix A

Relief and Holding Stanley R. Cohen, Esq., in Civil Contempt, July 19, 1995. Because the Plaintiffs have been enjoined from further prosecution, the case is dismissed.

Defendants have also moved for attorneys' fees and costs. Eighteen of the nineteen Plaintiffs in *Salvatore* attempted to join in *Spain*. The court denied the motion to amend the complaint and add the new Plaintiffs. The motion was denied due to futility — the claims of the prospective Plaintiffs were as defective as those of the actual *Spain* Plaintiffs and the claims dismissed in *Ring* and *Waugh*.

Attorney Cohen argues that because this court denied the motion to amend, the Plaintiffs were not part of *Spain* and, therefore, are not barred by the doctrine of res judicata. Technicalities aside, the court finds it inconceivable that, in the face of its memorandum in *Spain*, plus the previous rulings in *Ring* and *Waugh*, Attorney Cohen could have believed the claims were meritorious.

Based upon the above, the court finds that Attorney Cohen's actions with regard to *Spain*, *Adams VI* and *Salvatore* violated both Rule 11 and 28 U.S.C. § 1927. Not only has Attorney Cohen disregarded orders of the other courts, he consistently filed serious and unfounded allegations against defendants, and he has persisted in filing utterly futile claims on behalf of his clients.

Rule 11 authorizes an "order directing payment to the movant of some or all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Defendants have submitted affidavits which state that they have incurred $62,194.65 and $4,305.62 in attorneys' fees and costs

Appendix A

defending *Spain* and *Adams VI;* and $8,872.00 and $547.21 in attorneys' fees and costs defending *Salvatore*. For the reasons set forth above, it is ORDERED that Attorney Stanley R. Cohen, Esq., pay the defendants attorneys' fees and costs incurred by the need to defend these three suits.

Defendants' request that this court forward a copy of this order to the Board of Bar Overseers for disciplinary action is DENIED without prejudice. With regard to this matter, Defendants may take whatever further actions they deem appropriate.

III.

Conclusion

For the foregoing reasons, the Defendants' Motion to Dismiss *Salvatore, et al. v. Cumberland Farms, Inc., et al.*, CA No. 95-11170-JLT is ALLOWED; Defendants' motions for sanctions, attorneys' fees and costs is ALLOWED.

An order will issue.

s/ Joseph L. Tauro
United States District Judge

APPENDIX B — ORDER OF DISMISSAL OF THE SUPERIOR COURT FOR SUFFOLK COUNTY DATED JULY 5, 1995

N.B. FOR CLERK'S USE ONLY
JUDGMENT ENTERED ON DOCKET _____19____
PURSUANT TO MASS.R.CIV.P. 58(a) AND NOTICE SENT TO PARTIES PURSUANT TO MASS.R.CIV.P. 77(d) AS FOLLOWS:

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION
NO. *91-231(ESSEX)*

CHERYL ADAMS PLAINTIFF(S)

v.

CUMBERLAND FARMS, INC., ET AL. DEFENDANT(S)

JUDGMENT ON MOTION TO DISMISS
(PURSUANT TO MASS.R.CIV.P.12(b)

THIS ACTION CAME ON TO BE HEARD ON THE MOTION OF DEFENDANT(S) *CUMBERLAND FARMS, INC., ET AL* TO DISMISS THE ACTION, AND THE COURT, *PATRICK J. KING*, J., PRESIDING, HAVING ALLOWED THE SAID MOTION, IT IS HEREBY ORDERED AND ADJUDGED THAT THE ACTION BE DISMISSED, AND THAT DEFENDANT RECOVER COSTS.

DATED AT BOSTON, MASSACHUSETTS, THIS *11TH* DAY OF *JULY* 1995

Appendix B

MICHAEL JOSEPH DONOVAN,
CLERK/MAGISTRATE

By: s/illegible
Assistant Clerk

Form Civ.P.46(2nd Rev.) 6-85 500

Appendix B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action
No. 93-2663

RICHARD WAUGH, et al.,
Plaintiffs

v.

DEMETRIOS HASEOTES, et al.,
Defendants

Civil Action
No. 91-231 (Essex)

CHERYL ADAMS,
Plaintiff

v.

CUMBERLAND FARMS, INC., et al.,
Defendants

NOTICE SENT: 7-17-95
S.R.C.
G.P.&H.
A.V.G.
M.M.&M.
P.J.M.
J.S.
(JG)

[Handwritten]
ORDER

Motion Allowed After Hearing. A Judgment of Dismissal shall enter in these cases.

P.J. King 7/11/95

Appendix B

DEFENDANTS' MOTION TO DISMISS

The undersigned defendants move to dismiss these cases, for the following reasons:

1. On September 8, 1993, the United States District Court for the District of New Jersey sented its Final Order and Judgment in *Curley, et al. v. Cumberland Farms, Inc., et al.*, Civil Action No. 86-5057, in which it certified, for settlement purposes only, a class of persons which includes all of the eleven remaining plaintiffs in this case.[1] The Final Order and Judgment in *Curley* dismissed with prejudice all claims of the class members which were or which could have been asserted in that case against Cumberland Farms, Inc. ("CFI"), its owners, directors, officers, employees, agents, attorneys, insurers or named insureds (the "Released Parties"), arising out of or in any way related to the class members' employment, including termination of employment at CFI, and enjoined the class members from instituting or prosecuting any suits against the Released Parties arising out of or related to the class members' employment, including termination of their employment at CFI. On May 19, 1994, the United States Court of Appeals for the Third Circuit affirmed the Final Order and Judgment and approved the class-wide settlement of claims in *Curley*.

2. On August 30, 1993, the United States Bankruptcy Court ordered the plaintiffs' inclusion in the *Curley* class. The

---

1. On December 31, 1993, this Court granted the defendants' motion to dismiss all claims of plaintiffs William Connors and Matthew Van Winkle; however, no judgment of dismissal was entered as to them. *See* fn. 3, below. On May 26, 1994, this Court granted the defendants' motion for summary judgment, and dismissed the claims of plaintiff Nancy French: a judgment of dismissal did issue as to her.

plaintiffs took an appeal from that order, which was docketed in the United States District Court for the District of Massachusetts as *Cheryl Adams, et al. v. Cumberland Farms, Inc.*, USDC Bankruptcy Appeal No. 93-40187-NMG.

3. On December 31, 1993, this Court (*per* Botsford, J.) ordered these cases stayed pending the outcome of the plaintiffs' appeal from the August 30, 1993, order of the Bankruptcy Court.

4. On June 7, 1995, the United States District Court for the District of Massachusetts denied the plaintiffs' appeal from the order of the Bankruptcy Court. Copies of the foregoing decisions are attached hereto.

Accordingly, the undersigned defendants respectfully request that these cases be dismissed, with prejudice. A proposed Order is attached hereto.

DATED at Portland, Maine this 14th day of June, 1995.

CUMBERLAND FARMS, INC., DEMETRIOS HASEOTES, BYRON HASEOTES, GEORGE HASEOTES, LILY H. BENTAS, JOHN DROLETTE, JAMES MUMMA, PETER PANTEZELOS, JOHN PECK, RICHARD JENSEN, DENNIS O'SULLIVAN, FRANCIS LOCKLIN, JR., MARGE OLSEN and HARRIET ANTHONY
By their attorneys:
MOON, MOSS, McGILL & BACHELDER, P.A.
Ten Free Street, P.O. Box 7250
Portland, Maine 04112-7250
(207) 775-6001

s/ Philip J. Moss
Philip J. Moss, BBO # 358020

APPENDIX C — ORDER OF THE MASSACHUSETTS APPEALS COURT ENTERED AUGUST 16, 1996

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

96-P-1154 (as consolidated with 96-P-1155 & 96-P-156)

CHERYL ADAMS

vs.

CUMBERLAND FARMS INC ET AL.

ORDER

For the reasons stated in the appellee's motiom to dismiss, it is ORDERED that the above-named appeal be, and hereby is dismissed with prejudice and without costs.

By the Court, (Perretta, Greenberg, and Flannery, JJ.)

s/ Cris Micchia
Special Assistant Clerk

Entered: August 16, 1996

APPENDIX D — JUDGMENT OF THE MASSACHUSETTS SUPREME JUDICIAL COURT ENTERED SEPTEMBER 11, 1996

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
For Suffolk County
No. SJ-96-0477

CHERYL ADAMS

vs.

CUMBERLAND FARMS, INC., et al, and two consolidated cases

JUDGMENT

On the papers, the request for extraordinary relief pursuant to G.L. c. 211, s. 3, is denied.

By the Court (Abrams, J.),

s/ Maura Doyle
Assistant Clerk

Entered: September 11, 1996